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Our Legal Chameleon, The Florida Homestead Exemption Part IV

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OUR LEGAL CHAMELEON, THE FLORIDA HOMESTEAD EXEMPTION: IV

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Part IV — HOMESTEAD PROCEDURAL LAW*

1. Jurisdiction of Homestead Claims

The mainsail of Florida homestead procedure has traditionally been the state circuit court, but its wind is not infrequently spilled by the county judge's court. The Florida Constitution[337] invests the circuit court with "exclusive original jurisdiction" not only of "all cases in equity" but also "of the action of ejectment and of all actions involving the titles or boundaries of real estate . . . ." By statute the circuit court is granted "equity jurisdiction" to determine whether any property, real or personal, is exempt when claimed to be so; to subject non-exempt property to satisfaction of judgment; to enjoin the sale of exempt property; and to order and decree that such property be set apart and shielded from forced sale.[338]

Leaving the circuit court for the moment, it is beyond question that in matters of homestead the Supreme Court of Florida has final appellate jurisdiction, and that our usual rule of only one appeal does not apply to probate proceedings.[339] A federal court, however, may deal with the

*The material in Part IV continues the discussion of the law of Florida homestead exemptions analyzed initially in 2 U. OF FLA. L. REV. 12-83 (1949). Part I analyzes the steps required for ascertaining the existence of the exemption of homestead realty from forced sale; Part II covers the inurement of this exemption and its influence on the transfer of homestead realty; Part III explains the difference between the realty and personalty exemptions from the standpoint of both forced sale and transfer; Part IV takes up the procedural aspects of securing exemption, including the troublesome problem of jurisdiction; and Part V, which will follow in the next issue, deals with the tax exemption, or, properly speaking, the realty and personalty exclusions from taxation. The complete text of Article X of the Constitution of the State of Florida, on which the realty and personalty homestead exemptions and the residence exclusion from taxation are based, is quoted in 2 U. OF FLA. L. REV. 83-84 (1949). The personalty tax exclusion, limited to household goods and personal effects, is set forth in FLA. CONST. Art. IX, §11.

[337]Art. V, §11.

[338]FLA. STAT. §§222.10, 222.09, 222.08 (1941).

[339]FLA. CONST. Art. V, §§5, 11.

Florida homestead exemptions whenever it has jurisdiction for some independent reason.[340] It quite properly purports to follow the Florida law in each instance,[341] of course, even when it unwittingly fails to do so.[342]

Descending to the bottom of the judicial ladder, the justice of the peace court[343] lacks jurisdiction to adjudicate a lien on homestead realty. This was definitely decided in *Haimovitz v. Hector*,[344] but the reasoning in Mr. Justice Whitfield's opinion indicates a basis broader than merely that of real estate as the object-matter of the litigation; he stresses the equity jurisdiction involved rather than the problem of determining title to realty, and emphasizes in particular the existence of adequate remedies in the circuit court. Indeed, the language is comprehensive enough to include homestead personalty as well.

This leads to one of the most vexing jurisdictional problems in Florida, namely, the overlap between the circuit court and the county judge's court whenever the probate of a will or the administration of an estate in intestacy embraces homestead property, either real or personal. Probate of wills and administration of the estates of decedents and minors are entrusted to the county judge's court,[345] subject to the supervision and

[340]*E.g., In re* Marschall, 296 Fed. 685 (C. C. A. 5th 1924); *In re* Porter, 3 F. Supp. 582 (S. D. Fla. 1933); *In re* David, 54 F.2d 140 (S. D. Fla. 1931) (bankruptcy); Croker v. Croker, 51 F.2d 11 (C. C. A. 5th 1931) (bill in equity to set aside devise of realty allegedly homestead); Lamb v. Ralston Purina Co., 155 Fla. 638, 21 So.2d 127 (1945) (agricultural composition proceedings).

[341]*Ibid.* The relationship between federal and state law was succinctly summarized by Brandeis, J., in Erie R. R. v. Tompkins, 304 U. S. 64, 78 (1938):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

Cf. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 496-497 (1941); *see* Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680 (1930).

[342]Croker v. Croker, 7 F.2d 218 (S. D. Fla. 1925); *cf.* the discussion of contiguity in 2 U. OF FLA. L. REV. 51 (1949).

[343]FLA. CONST. Art. V, §22; see FLA. STAT. §§37.01, 37.02 (1941) as to civil jurisdiction.

[344]79 Fla. 28, 83 So. 666 (1920). The judgment upon which execution was issued, and later enjoined, involved less than $100 and had been recorded in the office of the clerk of the circuit court; *cf.* FLA. STAT. §81.21 (1941).

[345]FLA. CONST. Art. V, §17; FLA. STAT. §§732.01-732.03, 732.41 (Cum. Supp. 1947); *cf.* Wells v. Menn, 154 Fla. 173, 177, 17 So.2d 217, 218 (1944). The term "probate" is broadly defined in FLA. STAT. §731.03(14) (Cum. Supp. 1947) to embrace both testate and intestate estates.

appellate jurisdiction of the circuit court and the right of final appeal to the Supreme Court.[346] Furthermore, courts of equity "have concurrent jurisdiction with the county judges in the construction of wills or of any parts thereof, but the court first obtaining jurisdiction for construction shall retain the same."[347]

Neither the county judge's court nor the county court is one of general jurisdiction in the course of the common law;[348] but in matters of probate the county judge's court has been said in a loose sense to exercise general jurisdiction within this circumscribed and defined field of activity, in that its jurisdiction therein is complete.[349] Authority to perform these duties obtains regardless of the fact that construction of the will in question necessarily determines disputed title to realty definitely embraced in the estate[350] or to personalty of a value not cognizable in the county judge's court in an action at law.[351]

[346]FLA. CONST. Art. V, §§11, 5; FLA. STAT. §§732.15-732.20 (Cum. Supp. 1947); *cf.* Pitts v. Pitts, 120 Fla. 363, 369, 162 So. 708, 711 (1935), as to other methods of attack on orders of the county judge. Each county must have a county judge, whose court is known as the "county judge's court," and may when the Legislature so decides have a "county court," the judge of which is the individual serving as county judge; but original jurisdiction in probate and administration always remains in the county judge's court and is never assigned to the county court, FLA. CONST. Art. V, §§16, 18, 17. As regards jurisdiction generally see FLA. STAT. §34.01 (1941) (county court), §§36.01, 36.02 (1941) (county judge's court), and an excellent recent general description of the work of the county judge by Brooker, *Let the County Judge Do It*, 23 FLA. L. J. 5 (1949). Broad problems of jurisdiction, such as the overall supervisory judicial power inherent in the Supreme Court, and the constant interplay in general among circuit courts, civil courts of record, county courts, and county judge's courts, are beyond the scope of this article.

[347]FLA. STAT. §732.42 (Cum. Supp. 1947). Ullendorff v. Brown, 156 Fla. 655, 24 So.2d 37 (1945), holds emphatically that jurisdiction properly established in probate in the county judge's court cannot be ousted by the circuit court.

[348]*E.g.*, Krivitsky v. Nye, 155 Fla. 45, 54, 19 So.2d 563, 568 (1944); *see* State *ex rel.* West's Drug Stores, Inc. v. Cornelius, 110 Fla. 299, 149 So. 332 (1933). A justice of the peace also lacks general jurisdiction, Porter v. State, 62 Fla. 79, 56 So. 406 (1911).

[349]*Contrast In re* Monks' Estate, 155 Fla. 240, 19 So. 2d 796 (1944), *with* Mott v. First Nat. Bank of St. Petersburg, 98 Fla. 444, 124 So. 36 (1929); *cf. In re* Niernsee's Estate, 147 Fla. 388, 2 So.2d 737 (1941). But note the limitations explained in Wallace v. Luxmore, 156 Fla. 725, 24 So.2d 302 (1946).

[350]Blanton v. State *ex rel.* McManus, 158 Fla. 667, 29 So.2d 865 (1947), upholding jurisdiction of county judge's court to decide whether the widow took fee simple, or life estate with power of disposition during her life only, and therefore whether beneficiaries named in her will or those in will of her husband took title to the realty upon her death.

[351]State *ex rel.* Florida Bank & Trust Co. v. White, 155 Fla. 591, 21 So.2d 213

Personalty. As has been noted in Part II, 1 *supra*,[352] homestead realty cannot be devised by a male homesteader leaving either a widow or lineal descendants, or by a female homesteader survived by lineal descendants. Intestacy is, so to speak, compelled; and such succession is today limited to three particular patterns, namely, descent of the entire estate to the widow in the absence of lineal descendants, or passage of a life estate to the widow, with vested remainders per stirpes to the lineal descendants, or outright vesting of the entire estate in the lineal descendants in the absence of a widow.[353] This may perhaps account for the strictures placed by our Supreme Court on alienation inter vivos.[354]

No such limitations exist in the case of personalty; and accordingly a decision as to its homestead or non-homestead character does not alone fix the recipients. Whether the widow or an heir figures among the successors has a definite bearing on how much is free to pass; the exemption accompanies this property, up to a maximum value of $1,000, if, and only if, the personalty in question goes to the widow, an heir, or both. Assuming that the deceased does bequeath it to them or dies intestate, and yet assuming that he in fact has unsecured debts exceeding a figure obtained by subtracting $1,000 from the value of all of his unencumbered personal property, the determination that $1,000 thereof is or is not homestead necessarily allocates it either to them, by virtue of the influence of the accompanying exemption as a shield against forced sale, or to his creditors.[355] The homestead personalty exemption does not, however, compel the property to pass to any particular person. One might hazard a guess that the confusion in thinking that crops out from time to time in visualizing the homestead personalty exemption has as its seed this type of situation.

(1944). FLA. CONST. Art. V, §17, confers upon the county judge's court "original jurisdiction in all cases at law in which the demand or value or [*sic*] property involved shall not exceed one hundred dollars"; §18 increases this limit to $500 in the county court.

[352]2 U. OF FLA. L. REV. 53 (1949).

[353]FLA. STAT. §§731.05, 731.25, 731.27 (Cum. Supp. 1947); *cf.* 2 U. OF FLA. L. REV. 53-61 (1949). An attempted devise of all property of the testator is nugatory as to the homestead realty under these circumstances; all personalty passes under the will as a part of the estate, but the homestead realty does not; *cf.* Efstathion v. Saucer, 158 Fla. 422, 29 So.2d 304 (1947).

[354]*Cf.* Part II, 3 *supra*, 2 U. OF FLA. L. REV. 67 (1949).

[355]Seashole v. O'Shields, 139 Fla. 839, 191 So. 74 (1939), *rehearing denied*, 139 Fla. 844, 191 So. 76 (1939); *cf.* Part III *supra*, 2 U. OF FLA. L. REV. 77 (1949). Descent in such instances is governed either by the will or, in intestacy, by FLA. STAT. §731.23

The fact is, then, that although passage of personal property and inurement of the exemption are separate and distinct concepts[356] they are nevertheless firmly bound together for purposes of analysis. Unlike problems involving realty, the questions applying to distribution of personalty arise in the following order:

1. To whom would this property pass without regard to unsecured creditors,[357] that is, what does the will provide or what do the laws of intestate succession prescribe by way of fixing the successors to free assets?
2. Does the group selected in answer to the first question include the widow, an heir, or both, among those entitled?
3. Does personal property that passes to any of them meet the other requirements for homestead exemption?[358]
4. If so, what is left out of the remainder, after satisfying the claims of creditors, for further distribution?

If the answer to the third question be in the negative, the fourth question becomes merely: What are the normal rules governing distribution of an estate? It is also apparent that the first question posed above is implicit in any consideration of the second; and that, if the answer to the second be negative, the third question cannot possibly arise, inasmuch as the exemption does not accompany any personalty of the homesteader after his death unless such property passes to the widow or an heir.

In the light of the foregoing discussion the opinion in *Carter's Admin-*

(Cum. Supp. 1947), limited as explained in note 356 *infra.*

[356]Hinson v. Booth, 39 Fla. 333, 22 So. 687 (1897). The laws governing descent, speaking in a broad sense, embrace dower, which must always be taken into consideration; *cf.* FLA. STAT. §731.34 (Cum. Supp. 1947). The one-third part allotted to the widow, in fee simple as to realty and absolutely as to personalty, which part she may take in lieu of her share in the estate under the will or in intestacy, does not apply to homestead realty, which descends under separate and distinct statutory provisions. See in general the helpful opinions by Harrison and Kanner, Assoc. JJ., in Efstathion v. Saucer, 158 Fla. 422, 29 So.2d 304 (1947), and *In re* McMillan's Estate, 158 Fla. 898, 30 So.2d 534 (1947), respectively. The provisions of FLA. STAT. §731.36 (Cum. Supp. 1947), relating to wearing apparel and some of the household goods, and of §733.20(1)(d) (Cum. Supp. 1947), covering family allowance, should be noted also. See in general Legis., 2 U. OF FLA. L. REV. 118 (1949).

[357]The excepted obligations, the time factor in determining precedence as between a lien and the homestead exemption claimed, and the paramount rank of statutory liens are discussed, respectively, in 2 U. OF FLA. L. REV. 18, 35, and 36, 79 (1949).

[358]The tests for qualification are explained in Part I *supra,* 2 U. OF FLA. L. REV. 17 (1949), except that as regards personalty the homesteader need not own realty provided his domicile is here, and the extent is set in dollars rather than acres; *cf.* Part III *supra,* 2 U. OF FLA. L. REV. 77 (1949).

istrators v. Carter,[359] still a leading case on this point, takes on an added importance, particularly this statement:[360]

> "It has heretofore been held that property which is exempt from seizure for the payment of debts is also exempt from liability and is not assets in the hands of an administrator subject to administration. Baker vs. State, 17 Fla., 406; Wilson Ex. vs. Fridenburg, 19 Fla., 461."

The first point to note is that the *Baker* and *Wilson* cases cited as authority decided nothing whatever concerning homestead personalty. In the *Baker* case the crop of oranges was specifically and properly regarded as realty;[361] in the *Wilson* case the dispute involved the family residence alone.

The second point to note is that the *Carter* case centered on the conflicting claims of creditors and heirs in intestacy. That the exemption of the homesteader accompanied $1,000 of his personalty when it passed to his heirs, as against his creditors, was the precise issue decided; and any statement going beyond this is dictum only.

Statements or implications indicating in a broad sense full and complete jurisdiction in the circuit court over "homestead" or "homestead exemptions" are uniformly found in cases involving either realty[362] or the assertion by creditors of the right to levy on the personalty of the homesteader during his life.[363] Even so, jurisdiction can be full without necessarily being exclusive.[364] Furthermore, the statutory provisions

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[359]20 Fla. 558 (1884).

[360]*Id.* at 561.

[361]Baker v. State, 17 Fla. 406, 407, 409 (1879); *accord,* Adams v. Adams, 158 Fla. 173, 28 So.2d 254 (1946). The *Baker* case was correctly interpreted in Barco v. Fennell, 24 Fla. 378, 5 So. 9 (1888).

[362]*E.g.,* Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 13 So.2d 448 (1943); Spitzer v. Branning, 135 Fla. 49, 184 So. 770 (1938); Brickell v. Palbicke, 123 Fla. 508, 167 So. 44 (1936); Haimovitz v. Hector, 79 Fla. 28, 83 So. 666 (1920). Other opinions stating that the homestead is not an asset in the hands of the administrator, yet demonstrating by their facts that realty alone was under consideration, are: Finlayson v. Love, 44 Fla. 551, 33 So. 306 (1902); Walker v. Redding, 40 Fla. 124, 23 So. 565 (1898); Hedick v. Hedick, 38 Fla. 252, 21 So. 101 (1896); *see* Godwin v. King, 31 Fla. 525, 539, 13 So. 108, 111 (1893).

[363]*E.g.,* Tracy v. Lucik, 138 Fla. 188, 189 So. 430 (1939); Bennett v. Bogue, 88 Fla. 109, 101 So. 206 (1924); McMichael v. Grady, 34 Fla. 219, 15 So. 765 (1894).

[364]See notes 368, 370, 372 *infra; cf.* United States v. California, 297 U. S. 175, 187

relating to exempt estates authorize not only distribution of homestead property, real as well as personal, by the county judge, but also permit him to determine whether such property is in fact homestead.[365] Again, the Small Estates Act[366] empowers him to "dispense with administration upon the estate of any testate or intestate" whenever "the entire estate is exempt from the claims of creditors under the constitution and statutes" of Florida.[367]

Parenthetically, from the standpoint of forced sale, it is perhaps advisable to note at this point that replevin of homestead personalty wrongfully seized under a writ of attachment was allowed in *Allan v. Ingram*,[368] in which the Supreme Court specifically held that the remedy in equity[369] is not exclusive. A comparatively recent action by a tenant in the county court to replevy his homestead furniture from a landlord failed to elicit any jurisdictional doubts.[370]

From a constitutional standpoint it cannot be disputed that the original equity jurisdiction of the circuit court is exclusive.[371] But this does not

(1936).

[365]FLA. STAT. §734.08 (Cum. Supp. 1947). *But cf.* FLA. STAT. §734.08 (1941). As originally worded this section read as follows:

> "If at any time during the course of administration it shall be made to appear to the county judge by petition, and in the event the allegations of said petition shall be denied, then by trial of the issues made, that the estate does not consist of more than the homestead and exempt personal property of the decedent, the county judge may thereupon direct and order the distribution of said estate among the persons entitled to receive the same and upon said distribution may thereupon enter his order relieving, releasing and discharging the personal representative."

In 1945 the same subsection was reworded by c. 22783, §4, FLA. STAT. §734.08 (Cum. Supp. 1947), so as to authorize the county judge to direct distribution anyhow, not only upon "petition that the estate consists of no more than the homestead and exempt personal property of the decedent," but even "in the event the allegations of said petition are denied by trial of the issues made . . . ." The result seems fantastic; it is submitted that this change in the meaning of the earlier provision was unintended, even by the draftsman. The older language was considered in Seashole v. O'Shields, 139 Fla. 839, 191 So. 74 (1939), in which the entire estate, which was homestead, consisted of $626.71 of personalty; and the jurisdiction of the county judge's court in administration was not even questioned.

[366]FLA. STAT., c. 735 (Cum. Supp. 1947).

[367]FLA. STAT. §735.04 (Cum. Supp. 1947); *cf.* §§735.05, 735.06.

[368]39 Fla. 239, 22 So. 651 (1897).

[369]Fla. Laws 1881, c. 3246, now FLA. STAT. §§222.08-222.10 (1941).

[370]Howard v. Calhoun, 155 Fla. 689, 21 So.2d 361 (1945).

[371]FLA. CONST. Art. V, §11.

mean that our Legislature is powerless to assign wholly or partly to other courts matters not lying exclusively within equity jurisdiction in the course of the common law;[372] and the roots of homestead are not that deep. In other words, jurisdiction over homestead property is not frozen within equity by the Constitution.

Viewed from another angle, it is readily apparent that, should homestead personalty be regarded as outside the estate, the probate judge could never exercise any jurisdiction over it, regardless of the fact that in many proceedings its homestead character stands undisputed. Yet we have just seen that he does in practice deal with its administration; and in doing so he necessarily passes on its homestead character as an unavoidable preliminary step.

Homestead personalty merits special consideration by the practitioner. The probate judge, sitting as the county judge's court, is not looking for it specifically, since what has come to be regarded as his constitutional incapacity to deal with issues involving realty allegedly homestead tends naturally to make him "homestead-unconscious" as regards personalty also. The homesteader, if he be one, is of course dead; and his successors are seldom aware of their legal rights. And personalty is notorious for its ability to vanish with a speed that is the perpetual envy of realty. Accordingly, any claim of personalty exemption should be made promptly, lest all the funds be dissipated in paying the debts of the homesteader and the heirs be left with naught but a claim against an insolvent administrator or executor.[373]

When the contention that certain personalty is homestead is advanced and no dispute ensues, the property is set aside by the probate judge as exempt. In the event of a contest over the exemption, however, the position is not entirely free from doubt. To be absolutely safe, one should go to the circuit court unless the estate qualifies as an exempt estate or a small estate.[374] There are no valid constitutional objections to the statutory vesting of jurisdiction over these latter in the county judge's court, as far as personalty is concerned; but as regards larger estates a statute declaring all homestead personalty to be a part thereof, and authorizing the county judge to adjudicate initially all claims of personalty exemption along with the more complicated non-homestead matters al-

[372]This proposition is ably substantiated by Buford, J., *In re* Niernsee's Estate, 147 Fla. 388, 2 So.2d 737 (1941).

[373]McDougal v. Brokaw, 22 Fla. 98 (1886).

[374]See notes 365, 366 *supra*.

ready encompassed in probate proceedings, is highly desirable. Meanwhile some doubt remains, although logically it should be resolved in favor of probate jurisdiction.

Realty. Jurisdiction over homestead realty is even worse confounded than that over personalty. Probably the most effective method of attacking the problem is to summarize at the outset the two major lines of argument, each of which commands considerable support.

On the one hand, the true line of demarcation between the jurisdiction of the county judge's court and the circuit court over realty allegedly homestead may be said to lie in the basic determination that it is homestead or non-homestead. A decision that it is homestead necessarily eliminates it from the estate, according to this view, while a contrary determination places it within the estate. There is no doubt today that when the choice is that of deciding merely whether a given individual qualifies for participation either as a devisee or as an intestate successor in apportionment of realty admittedly belonging to the estate, or when the task is one of fixing the type and amount of his share, the county judge should make the determination. But when the claim of homestead is involved, the problem of title arises as an issue separate and distinct from that of disposition of the estate, so the argument goes; and the first step is to determine what belongs to the estate. This answer must be given by the circuit court, inasmuch as title to realty is in issue and no probate jurisdiction can possibly arise unless and until such property is judicially declared a part of the estate. This view is substantiated by an emphatic opinion,[375] and it appears to be widely accepted by county judges.[376]

On the other hand, it can cogently be argued that probate jurisdiction of an estate includes by necessary implication the power to decide in the first instance what belongs to it; to administer an estate without knowing what it consists of is about as simple a task as picking up one side of a coin. The statutory provisions relating to exempt estates and small estates[377] embrace both realty and personalty, yet neither a proviso that the estate must be found to consist of the homestead realty and exempt personal property only, nor the mere fixing of a dollar limit on the estate as a whole, renders realty any the less real. The jurisdictional conflict

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[375]Spitzer v. Branning, 135 Fla. 49, 184 So. 770 (1938), 139 Fla. 259, 190 So. 516 (1939).

[376]*See, e.g.,* Collins v. Collins, 150 Fla. 374, 375, 7 So.2d 443 (1942).

[377]See notes 365, 366 *supra.*

remains unsolved: Which court is to decide whether an item of property belongs to the estate?

We have seen in the discussion of personalty, immediately preceding, that homestead personal property is not a part of equity jurisdiction in the course of the common law and is therefore not necessarily the exclusive province of the circuit court under the Constitution. No such escape presents itself, however, when the assignment of "exclusive original jurisdiction . . . of all actions involving the titles or boundaries of real estate"[378] is faced, unless the term "actions" can be strictly construed to exclude every issue of title related to probate proceedings. From a practical standpoint, however, the result that such a decision would produce is precisely what is needed, whether accomplished in this or a different manner.

A start, at least, has been made toward this goal; and the trend of late is to render unto the probate judge the things that are probate, even in those instances in which title to realty is inescapably in issue.[379] To date, however, the property in question has each time admittedly fallen within the estate; and our jurisdictional nemesis still pursues us in the form of real property alleged by some party in interest to lie outside.

At this point a trained logician might offer the pithy observation that the existence or absence of dispute is immaterial; any dealing with property as a part of the estate, whether this property be "admittedly" such or not, must of necessity rest on a determination by the judge dealing with it that it belongs to the estate. By the same token, if he rejects it, such a decision unavoidably rests on a determination that the property does not belong to the estate. That such an election is based on the homestead or non-homestead character of the property, as distinct from, say, the fact that it did not belong to the deceased in the first place, is irrelevant. Logically, then, either the probate judge has jurisdiction to fix the contents of the estate or he has not. If he has, then he should make this initial decision with regard to all property, homestead as well as non-homestead; if he has not, then the circuit court should in every instance, regardless of the existence of a contest, decide exactly what the estate consists of, or, in other words, what the county judge may or may not deal with in the probate proceedings.

The lines of battle now appear: either the statutes giving jurisdiction to the county judge's court in instances of exempt estates and small

[378]FLA. CONST. Art. V, §11.

[379]See note 350 *supra*.

estates are unconstitutional in so far as they purport to include homestead realty, or the underlying theory of *Spitzer v. Branning*[380] is fallacious. The constitutional validity of the former has not as yet felt a homestead broadside.[381] On the other hand, an attempt might be made to limit *Spitzer v. Branning* as a precedent on the ground that no specific decision as to homestead was made by the probate judge; the homestead character of the realty dealt with was overlooked at that stage by all concerned. Nevertheless, the fact remains that the property was handled as a part of the estate; and this by necessary implication involved the assumption that it was not homestead. This assumption was later seized upon as a fatal mistake.

Going a step further, is there any sound basis for holding that homestead realty is outside the estate in a broad sense? Certainly it is property left by the deceased. It differs from his other property in three respects only: he cannot devise it when he leaves a widow or lineal descendants; it passes pursuant to a statutory scheme different from, but no more mandatory than, the order of succession prescribed for other property in intestacy; and the interests of the widow, an heir, or both, are paramount to the normally superior claims of those creditors whose obligations are neither of the secured type nor relieved of the homestead bar by Section 1 of Article X. Nowhere does the Constitution banish this property from the estate; nor does title to realty in intestacy, whether the intestacy be forced or voluntary, constitute any more serious a question of title than does title to property left by will.[382]

[380]135 Fla. 49, 184 So. 770 (1938); 139 Fla. 259, 190 So. 516 (1939).

[381]In Coral Gables First Nat. Bank v. Hart, 155 Fla. 482, 20 So.2d 647 (1945), the Court rejected the contention that the statute is unconstitutional, as a violation of due process, merely because it fails to prescribe notice to creditors prior to entry of an order of "No Administration Necessary" upon *ex parte* petition. But the intestate owned no realty and owed no debts; and the opinion specifically points out that no homestead issues were involved. The initial adjudication had been made by the county judge. In Coral Gables First Nat. Bank v. Colee, 155 Fla. 498, 20 So.2d 675 (1945), the intestate was a childless married woman, evidently not the head of the family, with the result that once again homestead was not considered. The constitutionality of Fla. Laws 1935, c. 16992, now FLA. STAT., c. 735 (1941), authorizing adjudication of the homestead character of realty by the county judge, was raised in Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 897, 13 So. 2d 448, 453 (1943); but, since the Supreme Court was affirming a finding of homestead by the chancellor, the appellant was denied any standing to challenge the probate jurisdiction of the county judge in the initial proceedings. The constitutional issue was thus neatly sidestepped.

[382]See note 350 *supra*. This reasoning finds strong support in Bengston v. Setterberg, 35 N.W. 2d 623 (Minn. 1949), ruling out jurisdictional attack in a Spitzer v.

The most vulnerable spot in *Spitzer v. Branning*[383] is found in its impractical results; and accordingly the case merits detailed analysis. A will was contested by the widow of the testator. From the opinions it is evident that counsel for her, as well as the original counsel for the son, should have known that a portion of the estate was homestead realty; but for some reason the matter was overlooked. The county judge, not being omniscient as to facts not brought to his attention, divided all the property of the deceased in such a manner that the homestead realty happened to be allotted entirely to his widow; and the opinions do not indicate that any objection was made at the time. When she died some years later, she devised this property. Thereafter the son finally awoke and claimed his share of this portion of the estate, although the original allotment to trustees under the testamentary trust of his father, of which the son was a beneficiary, had unwittingly been enlarged by the assumption that there was no homestead realty.

Had a timely appeal been filed in the probate proceedings, the jurisdictional issue could readily have been avoided by a reversal based on failure to apply the substantive law governing descent of homestead realty; but after the lapse of several years a collateral attack predicated on lack of jurisdiction was the only move left. The homestead land was reapportioned on the ground that the widow did not own, and accordingly could not devise, property over which the probate judge had lacked jurisdiction at the time he allocated it to her outright as part of her share. The matter of equitable readjustment was, in fairness, left open by the Supreme Court for still further dispute.

Assuming that this readjustment was later effected, as indeed it should have been, the net result was that after years of litigation, including two pilgrimages to the Supreme Court, the parties were finally back where they started, minus costs and counsel fees, and, in all probability, minus increased expenses of the corporate trustee. There is one exception to this statement: the unfortunate devisees of the widow were left without the realty, and her intent was completely thwarted when she was no longer on hand to rectify the matter.

This case marks another stirring performance of the Ballet of the Jurisdictional Categories. The dance begins with a lively and sustained duo by Estate and Probate; the latter slips, whereupon Homestead and Procedure, disguised as Constitution, leap upon the stage; finally Equity,

Branning controversy.

[383]135 Fla. 49, 184 So. 770 (1938); 139 Fla. 259, 190 So. 516 (1939).

leading Corporate Trustee, scurries in to restore the symmetry. The dance ends with Estate, by now nearly exhausted, moving wearily through the opening steps again, this time in the arms of Equity. To some this may appear as a legal spectacle of rare beauty, but one cannot easily put from his mind the timely reference of Mehrtens to "the impatience of laymen with the concept of law in action as a game. Since the laymen pay for the game, such an objection comes from a valid source."[384]

It is difficult to discover any cogent defensive arguments against placing all probate jurisdiction, including determination of the homestead character of both realty and personalty, in the county judge's court. Although not required by law to be members of the bar, the vast majority of the county judges are today attorneys. The "supervision and appellate jurisdiction" of the circuit court in probate matters insures ready correction of any error.[385] Expense would be less. And any judge deemed competent to handle estates running into hundreds of thousands of dollars can safely be trusted to make the initial decision as to the first thousand of personalty and any alleged family residence in Florida. Furthermore, since most of the factors required to establish the existence of the homestead realty exemption govern the personalty exemption as well, it is definitely desirable to assign the decision of both matters to the same court. Obviously the probate court is the tribunal best suited to perform this function in the first instance.

An amendment to the Constitution may not, strictly speaking, be necessary to effectuate this, as the foregoing analysis demonstrates; but, with the situation so doubtful, it is not surprising to find the issue definitely settled in the language proposed by the Committee on New Constitution of the Florida State Bar Association.[386] Should this proposal meet with the customary delay, one hopes that in any event the Supreme Court will, in future decisions involving this jurisdictional tangle, maintain the realistic attitude manifested of late in instances of title to realty dependent upon the construction of a will.[387]

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[384]*Deposition and Discovery in Florida under the Federal Rules,* 1 U. OF FLA. L. REV. 149, 200 (1948); *cf.* Fee, *Justice in Search of a Handmaiden,* 2 U. OF FLA. L. REV. 175, 213, 217 (1949).

[385]FLA. CONST. Art. V, §11; *cf., e.g., In re* Lorenzo's Estate, 35 So.2d 587 (Fla. 1948); Miller v. Nelson, 35 So.2d 288 (Fla. 1948); *In re* Thompson's Estate, 145 Fla. 42, 199 So. 352 (1940); Rahming v. Mackey, 136 Fla. 713, 187 So. 579 (1939).

[386]23 FLA. L. J. 91, 93 (1949).

[387]See note 350 *supra.*

2. *Methods of Proceeding*

Forced Sale — The Debtor. The owner of realty may record in the office of the county judge his claim that certain property is his homestead.[388] Undoubtedly such a declaration is of some value as an evidentiary fact leading to the desired conclusion or finding of fact that the property so claimed is homestead. It is equally certain, however, that failure to record a declaration of this type is not fatal to the characterization of the property as homestead,[389] nor does recording conclusively establish such characterization.[390] In this connection it is well to note that a claim relating to the so-called homestead tax exemption, which is actually nothing but a residence exclusion available even to a single person living alone, is governed by separate rules, based on radically different concepts; no reliance whatever can be placed thereon in establishing family headship and the existence of the exemption from forced sale or the influence of such exemption on transfer of the property involved;[391] a claim of tax exemption carries weight with regard to no more than the problem of fixing the domicile or permanent residence of the claimant.[392] It is, nevertheless, advisable to record one's residence as a homestead.

Whenever the property claimed as homestead is possessed by another and the claimant is entitled to possession, the obvious remedy is an action of ejectment in the circuit court.[393] When brought by the heirs against

[388]FLA. STAT. §222.01 (1941).

[389]Hutchinson Shoe Co. v. Turner, 100 Fla. 1120, 130 So. 623 (1930); Baker v. State, 17 Fla. 406 (1879); *cf.* Fidelity & Casualty Co. v. Magwood, 107 Fla. 208, 210, 145 So. 67, 68 (1932).

[390]Drucker v. Rosenstein, 19 Fla. 191 (1882); Oliver v. Snowden, 18 Fla. 823 (1882) (both dealing with Fla. Laws 1869, c. 1715, §1, from which FLA. STAT. §222.01 (1941) has come down with no change whatever as regards the matter here under consideration).

[391]FLA. STAT. §§192.16, 167.72 (Cum. Supp. 1947); Shambow v. Shambow, 153 Fla. 760, 15 So.2d 836 (1943), in which the distinction is concisely put by Adams, J.; Nelson v. Franklin, 152 Fla. 694, 12 So.2d 771 (1943); *cf.* Giddens v. McFarlan, 152 Fla. 281, 10 So.2d 807 (1943). The subject of tax exclusions is discussed in Part V *infra.*

[392]*Cf.* Collins v. Collins, 150 Fla. 374, 7 So.2d 443 (1942), in which the claim of tax exemption for three successive years immediately preceding the death of the alleged homesteader was given weight in reaching a conclusion that the realty claimed to be homestead for descent purposes was in fact his residence.

[393]*E.g.,* Gulf Refining Co. v. Ankeny, 102 Fla. 151, 135 So. 521 (1931); Raulerson v. Peeples, 77 Fla. 207, 81 So. 271 (1919); Barclay v. Robertson, 67 Fla. 416, 65 So. 546 (1914).

executors or administrators, however, and one of the heirs is a minor, a bill in equity is the proper procedural medium for setting apart a homestead out of a larger tract.[394] In other instances a homesteader may wish to file to bill to quiet title,[395] or to enjoin the sale of realty claimed to be exempt,[396] or to cancel deeds allegedly invalid,[397] or to obtain relief in a general way.[398]

Turning to personalty, an action of replevin to recover possession is available.[399] Alternatively, the remedies created by statute may be pursued.[400] Or a claim of equitable lien may be advanced.[401] Furthermore, a debtor need not await immediate threat of forced sale before taking steps to establish homestead exemption.[402]

Forced Sale — The Creditor. Perhaps the most important step for a creditor is to obtain a specific mortgage, since a blanket waiver is ineffectual.[403] Judgment liens should be recorded in each county in which

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[394]*Contrast* Barco v. Fennell, 24 Fla. 378, 5 So. 9 (1888), *with* Shone v. Bellmore, 75 Fla. 515, 78 So. 60 (1918); *cf.* CRANDALL, FLORIDA COMMON LAW PRACTICE 394 (1928). Ejectment does lie, however, even by minors, when the boundaries of the homestead are not in dispute, Raulerson v. Peeples, *supra* note 393. The distinction between ejectment and equity in boundary disputes is carefully analyzed in KOOMAN, FLORIDA CHANCERY PLEADING AND PRACTICE 14 (1939). For an excellent discussion of the use of ejectment see also the opinion of Whitfield, J., in Walters v. Sheffield, 75 Fla. 505, 78 So. 539 (1918).

[395]*E.g.*, Smith v. St. Petersburg Novelty Works, 94 Fla. 540, 113 So. 769 (1927); Hutchinson Shoe Co. v. Turner, 100 Fla. 1120, 130 So. 623 (1930). On the subject of quieting title pursuant to statute see Legis., 1 U. OF FLA. L. REV. 395 (1948); 2 U. OF FLA. L. REV. 156 (1949).

[396]*E.g.*, Coleman v. Williams, 146 Fla. 45, 200 So. 207 (1941); Morehead v. Yongue, 134 Fla. 135, 183 So. 804 (1938).

[397]*E.g.*, Florida Nat. Bank of Jacksonville v. Winn, 158 Fla. 750, 30 So.2d 298 (1947); Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940).

[398]LaMar v. Lechlider, 135 Fla. 703, 185 So. 833 (1939).

[399]Howard v. Calhoun, 155 Fla. 689, 21 So.2d 361 (1945); Allen v. Ingram, 39 Fla. 239, 22 So. 651 (1897).

[400]FLA. STAT., c. 222 (1941). Certain of these remedies apply to both realty and personalty, *e.g.*, Giddens v. McFarlan, 152 Fla. 281, 10 So.2d 807 (1943) (realty); Bennett v. Bogue, 88 Fla. 109, 101 So. 206 (1924) (personalty).

[401]*E.g.*, Sonneman v. Tuszynski, 139 Fla. 824, 191 So. 18 (1939); Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925).

[402]Smith v. St. Petersburg Novelty Works, 94 Fla. 540, 113 So. 769 (1927) (realty); West Florida Grocery Co. v. Teutonia Fire Ins. Co., 74 Fla. 220, 228, 77 So. 209, 212 (1917) (personalty, at least as there construed).

[403]*Contrast In re* Comstock's Estate, 143 Fla. 500, 197 So. 121 (1940), *with* Heddon

the judgment debtor has property, and it is vital that this be done before such property becomes homestead.[404] Remedies to enforce statutory liens or obligations excepted from the bar of homestead exemption should not be overlooked.[405] The statutory remedies authorizing survey and sale, or a bill to test alleged exemptions, are most effective;[406] and concealment by the debtor of his assets can be brought to light and rectified.[407]

Probate. The claim of homestead exemption in probate proceedings should be raised promptly, and if denied should be placed in issue at once. The analysis of jurisdiction[408] is applicable here. While the court will do its utmost to protect homestead exemptions, the judge cannot be expected to divine factual situations overlooked by counsel and carelessly omitted in the pleadings and the record.[409] The statutory provisions relating to exempt estates and small estates have already been mentioned.[410] A declaratory decree may be sought.[411] A suit for partition is frequently used.[412]

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v. Jones, 115 Fla. 19, 154 So. 891 (1934) (realty); *contrast* Richardson v. Myers, 106 Fla. 136, 143 So. 157 (1932), *with* Lowe v. Keith, 138 Fla. 654, 190 So. 67 (1939), *and* Carter's Adm'rs v. Carter, 20 Fla. 558 (1884) (personalty).

[404]See Part I, 5 *supra,* 2 U. OF FLA. L. REV. 35-36 (1949); *cf.* Heddon v. Jones, *supra* note 403.

[405]See in general FLA. CONST. Art. X, §1; FLA. STAT., c. 85 (1941); Howard v. Calhoun, 155 Fla. 689, 21 So.2d 361 (1945) (claim of landlord for rent); Cathcart v. Turner, 18 Fla. 837 (1882) (agricultural products of tenant not exempt); *contrast* Hodges v. Cooksey, 33 Fla. 715, 15 So. 549 (1894). How far the Supreme Court will go in whittling away the exemptions guaranteed by our Constitution is impossible to predict at this time; *cf.* the discussion *supra* in 2 U. OF FLA. L. REV. 79-80 (1949).

[406]FLA. STAT. §§222.03, 222.04, 222.06, 222.10 (1941).

[407]Florida Loan & Trust Co. v. Crabb, 45 Fla. 306, 33 So. 523 (1903); *cf.* Shollar Crate and Box Co. v. Passmore, 148 Fla. 466, 4 So.2d 530 (1941).

[408]See Part IV, 1 *supra.*

[409]*Compare, e.g.,* Hedick v. Hedick, 38 Fla. 252, 21 So. 101 (1896), *with* Spitzer v. Branning, 135 Fla. 49, 184 So. 770 (1938).

[410]See notes 365, 366, 381 *supra.*

[411]Adams v. Adams, 158 Fla. 173, 28 So.2d 254 (1946). Declaratory decrees are today provided by FLA. STAT., c. 87 (Cum. Supp. 1947).

[412]*E.g.,* Nelson v. Franklin, 152 Fla. 694, 12 So.2d 771 (1943); Parrish v. Robbirds, 146 Fla. 324, 200 So. 925 (1941); McEwen v. Larson, 136 Fla. 1, 185 So. 866 (1939); Bess v. Anderson, 102 Fla. 1127, 136 So. 898 (1931).

Practical Strength of Decree of Chancellor. Success before the chancellor is of the utmost importance. Normally his findings stand,[413] even though the Supreme Court may entertain some doubt.[414] Reversals can always be based on errors of law, of course, the outstanding example being the five appeals in *Oates v. New York Life Ins. Co.*,[415] a brilliant exhibition of judicial badminton by two fast Supreme Court teams, with the hapless chancellor playing the difficult position of the bird. Since, however, conflicting evidence will be re-weighed only to the extent necessary to determine whether the findings of fact are clearly erroneous or without substantial evidentiary support, reversals are properly confined to errors of law and to findings of fact upon which the decision below necessarily rests and yet which could not have been reached on the basis of the evidence in the record.[416]

3. Waiver, Estoppel and Laches

It may be stated as a general principle that the courts are reluctant to impair the assertion of a claim of homestead exemption. It may be fur-

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[413]*E.g.*, United States Fidelity and Guaranty Co. v. Marshall, 148 Fla. 286, 292, 4 So.2d 337, 339 (1941); Weber v. Harvey, 127 Fla. 706, 174 So. 5 (1937); Harkins v. Holt, 124 Fla. 774, 778, 169 So. 481, 482 (1936); Lanier v. Lanier, 95 Fla. 522, 116 So. 867 (1928). This is true even on review of a decree based on testimony taken before an examiner or master, Shad v. Smith, 74 Fla. 324, 76 So. 897 (1917). As regards the findings of the master, the rule was recently pronounced by Hobson, J., in Miami v. Huttoe, 38 So.2d 819, 820 (Fla. 1949), "that a Chancellor should give great weight to the findings and recommendations of a Master and follow them unless such findings and recommendations are manifestly against the clear preponderance of the evidence." *Cf.* Thomas, J., in Cohien v. Fincke, 39 So.2d 65 (Fla. 1949) *passim.*

[414]*E.g.*, Smith v. Guckenheimer & Sons, 42 Fla. 1, 19, 27 So. 900, 916 (1900).

[415]113 Fla. 678, 152 So. 671 (1934); New York Life Ins. Co. v. Oates, 122 Fla. 540, 166 So. 269 (1935), *rev'd on rehearing*, 122 Fla. 565, 166 So. 279 (1936); Oates v. New York Life Ins. Co., 130 Fla. 851, 178 So. 570 (1937); New York Life Ins. Co. v. Oates, 141 Fla. 164, 192 So. 637 (1939); Oates v. New York Life Ins. Co., 144 Fla. 744, 198 So. 681 (1940); *cf.* Smith v. McEwen, 119 Fla. 588, 592, 161 So. 68, 70 (1935).

[416]*E.g.*, Weber v. Harvey, 127 Fla. 706, 174 So. 5 (1937); Helland v. Evans, 113 Fla. 839, 152 So. 623 (1934); *contrast* the opposite aspect of this rule, as applied in Saliba v. Saliba, 37 So.2d 536 (Fla. 1948). The meaning of "substantial evidence" is discussed in Note, 2 U. OF FLA. L. REV. 86, 93 (1949), as related to review of administrative orders. Whether there is a conceptual distinction in chancery appeals between "lack of substantial evidence" and "clear error in findings" is beyond the scope of our discussion here.

ther laid down as a general proposition that with the exception of the tax exclusions, dealt with in Part V *infra,* true waiver is a stranger to the law of homestead. In a loose sense either a specific mortgage or the creation of a legal relationship involving statutory liens by operation of law might be regarded as a waiver; and there is also the individual that deliberately chooses to pay his debts, in which event any transfer of homestead realty must be performed strictly in accordance with the formal legal requisites.[417] The fact remains, however, that few losses of homestead rights are occasioned by estoppel or laches.

The principles governing estoppel are analyzed with customary thoroughness by Mr. Justice Whitfield in the fourth *Oates* appeal.[418] In particular, the party alleging the estoppel must have changed his position to his own detriment in reliance upon the act or omission of the other party.[419] Equitable estoppel, which constitutes the basis of equitable liens,[420] has been invoked on occasion, particularly in instances in which a widow makes a void conveyance of the homestead; in such event the conveyance is upheld as to her interest, inasmuch as she should not be permitted to profit by her illegal act.[421] Estoppel has not infrequently been employed to bar denial by the wife of proper acknowledgment after she has executed and purported to acknowledge a document.[422]

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[417]See Part II, 2 *supra,* 2 U. OF FLA. L. REV. 62 (1949). Conveyance of homestead realty by the wife, without a joinder by a guardian authorized by a court of equity to act for the insane husband, has been declared insufficient to pass valid title, even though the wife be his guardian for other purposes. Stokes v. Whidden, 97 Fla. 1057, 122 So. 566 (1929). The recent Florida Guardianship Law does not apply to conveyance of homesteads, FLA. STAT. §745.15(5) (Cum. Supp. 1947).

[418]New York Life Ins. Co. v. Oates, 141 Fla. 164, 175, 192 So. 637, 642 (1939).

[419]Spitzer v. Branning, 135 Fla. 49, 184 So. 770 (1938), 139 Fla. 259, 190 So. 516 (1939).

[420]Jones v. Carpenter, 90 Fla. 407, 414, 106 So. 127, 129 (1925). This opinion, by Terrell, J., contains a very helpful analysis of equitable liens and their basis in the doctrine of estoppel.

[421]Shone v. Bellmore, 75 Fla. 515, 526, 78 So. 605, 608 (1918); *cf.* Kerivan v. Fogal, 156 Fla. 92, 22 So.2d 584 (1945); Jahn v. Purvis, 145 Fla. 354, 359, 199 So. 340, 343 (1940); Church v. Lee, 102 Fla. 478, 490, 136 So. 242, 248 (1931); Mullan v. Bank of Pasco County, 101 Fla. 1097, 1114, 133 So. 323, 330 (1931).

[422]The cases indicate an epidemic of notarial incompetence. *Contrast, e.g.,* Oates v. New York Life Ins. Co., 144 Fla. 744, 198 So. 681 (1940), *and* Bank of Jennings v. Jennings, 71 Fla. 145, 71 So. 31 (1916), *with* Helland v. Evans, 113 Fla. 839, 152 So. 623 (1934), Hutchinson v. Stone, 79 Fla. 157, 84 So. 151 (1920), *and* Shad v. Smith, 74 Fla. 324, 76 So. 897 (1917); *cf.* the discussion of presumptions in Part IV, 5 *infra.*

The doctrine of laches, namely, that failure to exercise reasonable diligence in asserting one's rights results in their loss, is applied sparingly against claimants of homestead exemption, although in extreme cases it has been utilized with telling effect.[423] Mere failure to resist forced sale, however, is not in and of itself sufficient to establish a waiver of the right to exemption;[424] nor does the claimant lose his rights by neglecting to assert them at the first opportunity provided he moves before expiration of the time allowed him by law, even though the practical effect of his delay may prove unfortunate for others proceeding in good faith though rather carelessly.[425] Remaindermen are not barred by laches merely because they permit their widowed mother to remain on the homestead property, ostensibly in their eyes as a life tenant rather than as owner in fee simple, unless they in fact have notice that her possession is not what it purports to be and yet stand idly by while a third party is misled.[426] Again, both parties may have been asleep, in which event laches will not be attributed to either.[427]

4. Need for a Homestead Limitations and Filing Act

Although the doctrines of estoppel and laches have been applied at various times, the mind of a property lawyer is not content to rest upon mere equity when passing definitely on the soundness of a title. The result is that the possibility of homestead claims is left dehors the record; a proper title opinion is virtually impossible in cases of real property that may be subject to the law of homestead. The Supreme Court has frankly admitted that the public records as presently kept furnish no dependable clues as to either the use of the property or family headship, and that conditions may well change from time to time without any reflection in the

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[423]Jones v. Equitable Life Assur. Soc'y, 126 Fla. 527, 171 So. 317 (1936); Moseley v. Taylor, 68 Fla. 294, 67 So. 95 (1914); Barclay v. Robertson, 67 Fla. 416, 65 So. 546 (1914).

[424]Fidelity & Casualty Co. v. Magwood, 107 Fla. 208, 145 So. 67 (1932); Hutchinson Shoe Co. v. Turner, 100 Fla. 1120, 130 So. 623 (1930); Albritton v. Scott, 73 Fla. 856, 74 So. 975 (1917); McMichael v. Grady, 34 Fla. 219, 228, 15 So. 765, 768 (1894).

[425]Giddens v. McFarlan, 152 Fla. 281, 10 So.2d 807 (1943); Jahn v. Purvis, 145 Fla. 354, 357, 199 So. 340, 342 (1940).

[426]*Contrast* Mullan v. Bank of Pasco County, 101 Fla. 1097, 133 So. 323 (1931), *with* Commercial Bldg. Co. v. Parslow, 93 Fla. 143, 112 So. 378 (1927).

[427]Spitzer v. Branning, 135 Fla. 49, 184 So. 770 (1938).

records.[428] As a result, the unfortunate purchaser can only hope that the homestead demon will not suddenly arise out of the legal bog and gobble up his property.

This unhealthy condition could readily be altered. To be completely safe a constitutional amendment would be best; but the Legislature has full powers under Section 6 of Article X to "enact such laws as may be necessary to enforce" the homestead provisions, and a filing act would in all probability ride out any constitutional storm, provided it prescribed a reasonable period, subsequent to its enactment, within which claims of homestead existing at the time of enactment should be filed.[429]

The mere filing, or recording if preferred, could not of itself conclusively establish homestead, of course, but neglect in filing a claim could be rendered a waiver by the homesteader of exemption from forced sale. Similarly, failure on the part of interested successors to claim any of the estate as homestead within a fixed period after the death of the owner could be made a waiver of all such contentions on their part. To be sure, some few individuals might inadvertently lose rights they would otherwise have; but no copious tears have been shed over the loss of the homestead tax exclusions occurring whenever the required annual claim therefor is not filed on or before the first of April. The presumption that each person governed knows the law springs in desperation from communal necessity rather than from fact; indeed, everyone knows that this presumption is the opposite of the truth. Yet it has long endured, in spite of the hardships it has occasioned at times.[430]

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[428]*See* Bigelow v. Dunphe, 143 Fla. 603, 606-607, 197 So. 328, 330 (1940). Recorded encumbrances can be checked, however, and prudent counsel will make a search; *cf.* Giddens v. McFarlan, 152 Fla. 281, 10 So.2d 807 (1943).

[429]Detailed discussion of this matter is outside the scope of this article; see generally FLA. CONST. Art. III, §33; Mahood v. Bessemer Properties, Inc., 154 Fla. 710, 18 So.2d 775 (1944); Campbell v. Horne, 147 Fla. 523, 3 So.2d 125 (1941); Lee v. Lang, 140 Fla. 782, 192 So. 490 (1939); Rogers, *Florida Curative Statutes,* 22 FLA. L. J. 153 (1948).

[430]The maxim *ignorantia iuris haud excusat* has been accepted for centuries; *cf.* DIGEST 22.6.9.pr.: *Regula est, iuris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere*; Cooper v. Phibbs, L. R. 2 H. L. 149, 170 (1867) (per Lord Westbury); M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 723 (1843) (per Tindal, L. C. J.); Stewart v. Stewart, 6 Cl. & Fin. 911, 965-971, 7 Eng. Rep. 940, 962-964 (1839) (per Cottenhan, L. C.); Barlow v. United States, 7 Pet. 404, 411 (U. S. 1833) (per Story, J.).

5. Burdens and Presumptions

Burdens. Burden of proof in homestead law is largely a matter of common sense. The basic principle is that he who alleges something affirmatively must establish it.[431] That a creditor must establish the debt, as well as the existence and date of his lien, if any, is elementary. Thereupon, if the homestead exemption be advanced in order to avoid levy, the claimant must plead and prove that he is entitled to the exemption.[432] He should allege that the realty is the family home,[433] or that the personalty claimed as exempt does not exceed $1,000;[434] that the owner is the head of a family,[435] and also a resident of Florida;[436] that the land lies in one tract or contiguous tracts;[437] that it is rural and does not exceed 160 acres, or that it is urban and does not exceed one-half acre;[438] that these factors existed at the time the lien attached;[439] and that the obligation is not one specifically excepted from the protection of homestead exemption.[440]

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[431]The general theory of burden of proof, including the different meanings of the term, and the debated distinction between burden of proof and burden of going forward, are beyond the scope of this article. A thorough analysis is contained in 9 WIGMORE, EVIDENCE §§2485-2489 (burdens of proof), 2490-2493 (presumptions) (3d ed. 1940).

[432]Matthews v. Jeacle, 61 Fla. 686, 55 So. 865 (1911); *cf.* TRIBBLE, TRIAL MANUAL OF FLORIDA Evidence §2387 (1948).

[433]*Ibid.*

[434]*E.g.*, Sneed v. Davis, 135 Fla. 271, 184 So. 865 (1938).

[435]*E.g.*, Herrin v. Brown, 44 Fla. 782, 33 So. 522 (1902); Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328 (1940), *aff'd on rehearing*, 144 Fla. 330, 198 So. 13 (1940). In spite of the occasional appearance of rather loose language, it is evident from the decision in the latter case that in the eye of the law there is no presumption that the husband is the family head; headship must be proved, whether the claimant thereto be male or female. But the corollary follows that a third party cannot safely assume that the husband is the family head, even though this is normally the fact in Florida.

[436]*E.g.*, Post v. Bird, 28 Fla. 1, 24, 9 So. 888, 894 (1891).

[437]*E.g.*, Brandies v. Perry, 39 Fla. 172, 22 So. 268 (1897).

[438]FLA. CONST. Art. X, §1; *cf., e.g.*, Barco v. Fennell, 24 Fla. 378, 5 So. 9 (1888) (rural); McEwen v. Larson, 136 Fla. 1, 185 So. 866 (1939) (urban).

[439]*E.g.*, Bishop v. First Old State Bank, 142 Fla. 190, 194 So. 488 (1940); Dania Bank v. Wilson & Toomer Fertilizer Co., 127 Fla. 45, 172 So. 476 (1937); First Nat. Bank of Chipley v. Peel, 107 Fla. 413, 145 So. 177 (1932); Pasco v. Harley, 73 Fla. 819, 75 So. 30 (1917); Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912).

[440]*E.g.*, Smith v. St. Petersburg Novelty Works, 94 Fla. 540, 113 So. 769 (1927).

The creditor may then go forward and negative any one of these factors, as, for example, by offering evidence to prove that the homestead had been abandoned at the time the lien attached,[441] or that the family had dispersed,[442] or that the owner of the property was not in fact the head of the family at the material time,[443] or that the obligation lies within the excepted categories.[444] Alternatively, he may affirmatively allege that urban property claimed as exempt includes more than the residence and business house,[445] or that the debtor has concealed some assets,[446] in which event the burden of proof, as distinct from the mere burden of going forward, is on him.[447] A mere demurrer to allegations of homestead, whether these be in a bill[448] or an answer,[449] is of no avail, assuming of course that the homestead claim is properly pleaded.

Presumptions. Homestead law has gradually built up some presumptions of its own. An important principle, while not a presumption in the true sense of the word, is pertinent at this point: doctrines of equity, however cogent from the standpoint of fair dealing, are not permitted to override Article X of the Florida Constitution.[450] The creditor, including a mortgagee, is presumed to have ascertained the use of the mortgaged

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[441]*E.g.*, Murphy v. Farquhar, 39 Fla. 350, 22 So. 681 (1897); *cf.* Part I, 5 *supra*, 2 U. OF FLA. L. REV. 37, 40 (1949).

[442]Herrin v. Brown, 44 Fla. 782, 33 So. 522 (1902) (father left alone); *accord*, Matthews v. Jeacle, 61 Fla. 686, 55 So. 865 (1911) (mother left alone); Jordan v. Jordan, 100 Fla. 1586, 132 So. 466 (1931) (both left alone upon their separation after departure of adult children); *cf.* Part I, 2 *supra*, 2 U. OF FLA. L. REV. 28 (1949).

[443]*E.g.*, Jones v. Federal Farm Mtg. Corp., 138 Fla. 65, 188 So. 804 (1939); *cf.* Part I, 5 *supra*, 2 U. OF FLA. L. REV. 35 (1949).

[444]*Cf.* Part I, 1 *supra*, 2 U. OF FLA. L. REV. 18 (1949).

[445]*Contrast* McEwen v. Larson, 136 Fla. 1, 185 So. 866 (1939), *with* Cowdery v. Herring, 106 Fla. 567, 143 So. 433 (1932); *cf.* Part I, 5 *supra*, 2 U. OF FLA. L. REV. 40 (1949).

[446]*Cf.* 2 U. OF FLA. L. REV. 81-82 (1949).

[447]*E.g.*, Cowdery v. Herring, 106 Fla. 574, 144 So. 348 (1932) *on rehearing* (burden of proving more than residence and business house held not carried, although this holding was obviously conjured up as a handy procedural way out of an embarrassing contradiction in the substantive law), Shollar Crate and Box Co. v. Passmore, 148 Fla. 466, 4 So.2d 530 (1941) (burden of establishing fraud not met).

[448]*E.g.*, Johns v. Bowden, 68 Fla. 32, 46, 66 So. 155, 159 (1914). Demurrer is today effected in equity by motion.

[449]*E.g.*, Rigby v. Middlebrooks, 102 Fla. 148, 135 So. 563 (1931).

[450]McEwen v. Larson, 136 Fla. 1, 9, 185 So. 866, 869 (1939); *cf.* Bigelow v. Dunphe, 143 Fla. 603, 606, 197 So. 328, 330 (1940). *But cf.* Olsen v. Simpson, 39 So.2d 801,

premises and the existence and hierarchical structure of any apparent family residing thereon.[451] The problem of selecting the family head among elderly parents and healthy adult children residing together has been discussed at some length in Part I, 2 *supra*.[452] While there may be a slight leaning toward the oldest among either males or females as being the family head, the authorities in their present state do not lend themselves to safe indulgence in presumptions in these situations.

Transfer of property, whether homestead or not, by an insolvent husband to his wife raises two presumptions. The first is that the conveyance is voluntary; the second is that it is made in fraud of creditors. When, however, the husband is solvent at the time of transfer, the first presumption vanishes, and the voluntary nature of the conveyance must be established by the complaining creditor before the second presumption can operate. Once such evidence is introduced, the burden of going forward shifts to the defendant, who must negative the voluntary character of the transfer by offering clear and convincing evidence of consideration.[453] The customary recital in the deed, referring to some nominal amount of cash and other good and valuable consideration, is taken when standing alone to indicate mere voluntary transfer; in other words, this feeble effort to show consideration, in conveyances between husband and wife, has the practical effect of establishing just the opposite.[454]

Whenever the realty is homestead, any transfer by husband and wife to the wife, either directly or via a third party, is assumed to be voluntary, probably because of the judicial transformation of the homestead realty exemption into a rule of descent.[455] The heirs are treated as if they were creditors during insolvency; and such a transfer is presumed to be both voluntary and fraudulent as to them unless consideration is

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803 (Fla. 1949); these dicta may perhaps mark the birth of a contrary trend.

[451]*Ibid.*; *cf.* Jones v. Federal Farm Mtg. Corp., 138 Fla. 65, 188 So. 804 (1939).

[452]2 U. OF FLA. L. REV. 26-27 (1949).

[453]The law is expounded with exceptional clarity in Weathersbee v. Dekle, 107 Fla. 517, 145 So. 198 (1933), in which the Court set aside a mere voluntary conveyance of non-homestead realty by a debtor solvent at the time, but upheld a transfer of non-homestead personalty because not proven to have been voluntary; *accord,* Harkins v. Holt, 124 Fla. 774, 169 So. 481 (1936); Baker & Holmes Co. v. Gibson, 102 Fla. 891, 136 So. 544 (1931); Claflin v. Ambrose, 37 Fla. 78, 19 So. 628 (1896).

[454]Weathersbee v. Dekle, *supra* note 453; McKeown v. Allen, 37 Fla. 490, 20 So. 556 (1896) (alternative holding). The diminishing significance of a seal is discussed in Note, 1 U. OF FLA. L. REV. 385 (1948).

[455]*Cf.* Part II, 3, *supra,* 2 U. OF FLA. L. REV. 67 (1949).

affirmatively established by the party relying thereon.[456]

Notarization of acknowledgment, in correct form, raises a presumption of due and valid acknowledgment; the burden of going forward thereupon shifts to the party attacking to establish that the certificate is false,[457] and the chancellor must weigh the evidence if offered.[458]

Mere platting of land does not raise a presumption that it has been abandoned as a homestead,[459] even when accompanied by sale of certain of the lots,[460] although physical surrender to another is normally decisive of the issue of abandonment.[461]

Finally, as might be expected, there is the ironical yet familiar presumption that we all know the law of homesteads.[462]

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[456]A deed of homestead lands by parents to some of the children has been held valid, even though it reserved a life estate in the grantors, but valuable consideration was demonstrated by the evidence, Daniels v. Mercer, 105 Fla. 362, 141 So. 189 (1932). Again, conveyance by husband to wife after abandonment of the tract as homestead has been sustained against a creditor upon evidence of valuable consideration, Pettit v. Coachman, 51 Fla. 521, 41 So. 401 (1906). But the rule is as stated in the text, not only in instances of recital of consideration, without more, Mullan v. Bank of Pasco County, 101 Fla. 1097, 133 So. 323 (1931), but even in the absence of any allegation by the heirs of voluntary transfer, Church v. Lee, 102 Fla. 478, 485-488, 136 So. 242, 246-247 (1931).

[457]*See* New York Life Ins. Co. v. Oates, 141 Fla. 164, 178, 192 So. 637, 643 (1939).

[458]McEwen v. Schenck, 108 Fla. 119, 146 So. 839 (1933); *cf.* note 422 *supra.* The use of the word "conclusive" in referring to this presumption in Herald v. Hardin, 95 Fla. 889, 892, 116 So. 863, 864 (1928), is a trifle too broad, although the statement can be reconciled with the rule by regarding notarial incompetence as tantamount to fraud. The fact remains, however, that female notaries were allowed to impeach their own certificates in Helland v. Evans, 113 Fla. 839, 842, 152 So. 623, 624 (1934), and Hutchinson v. Stone, 79 Fla. 157, 171, 84 So. 151, 155 (1920). The logical basis of the distinction drawn in this latter case between presence before the notary and the other requisites of proper acknowledgment is indeed difficult to fathom; presence without acknowledgment is equally as ineffective as is acknowledgment without presence. In neither event is the notary authorized to certify.

[459]Hill v. First Nat. Bank of Marianna, 73 Fla. 1092, 75 So. 614 (1917).

[460]Shone v. Bellmore, 75 Fla. 515, 78 So. 605 (1918).

[461]Anderson Mill and Lumber Co. v. Clements, 101 Fla. 523, 134 So. 588 (1931). Both physical and functional abandonment are discussed in Part I, 5 *supra,* 2 U. OF FLA. L. REV. 37, 40 (1949).

[462]*E.g.,* Efstathion v. Saucer, 158 Fla. 422, 430, 29 So.2d 304, 308 (1947) (invalid devise of homestead realty); *In re* Comstock's Estate, 143 Fla. 500, 197 So. 121 (1940) (mortgage); *cf.* note 430 *supra.*

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